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SUPPLEMENTAL TESTIMONY OF PROFESSOR ROBERT C. FELLMETH BEFORE THE LITTLE HOOVER COMMISSION October 23, 2014

Interest of the Center for Public Interest Law (CPIL)

Our interest in the subject matter of this inquiry includes most of its elements: the Bagley-Keene Open Meeting Act (BK Act) and the related California sunshine statutes; and the major business regulatory agencies of the state, including the Public Utilities Commission (PUC). I am a graduate of Stanford University and the Harvard Law School, and currently hold the Price Chair in Public Interest Law at the University of San Diego School of Law. I have been the Executive Director of CPIL since its founding in 1980. We at CPIL are familiar with the BK Act, supporting its sustenance in the legislature and bringing suit to enforce its requirements. We have monitored agency compliance with it for some 29 state agencies, including the PUC, over the past 34 years. Most of these agencies are governed by boards or commissions subject to its terms. The BK Act, as well as the Public Records Act and the Administrative Procedure Act have also long been a part of the curriculum of our year-long Public Interest Law and Practice course, in which students assigned to specific agencies attend the applicable meetings, monitor agendas, rulemaking, relevant legislation and court cases; and write for our *California Regulatory Law Reporter*.[1]

I personally spent four years as Chair of the Athletic Commission, subject to the terms of the relevant statutes. I have taught "regulated industries" which focuses on PUC-type monopoly regulation, and am co-author of a treatise *California Regulatory Law and Practice*.[2] I also have some experience with the PUC, am a previous expert witness in cases before the Commission, and in 1983 helped to found the Utility Consumers Action Network (UCAN), the state's largest membership entity representing ratepayers before the Commission.

The Four Issues Necessarily Raised By These Proceedings and Related Events.

1. The Overbreadth of AB 1494 Applied to Agencies with Full Time Board Members who are Part of Agency Administration

This proceeding grew out of objections by some agencies to recent statutory amendments that would allegedly apply the BK Act so broadly that it would impede the internal workings of some agencies (*e.g.*, the PUC and the Energy Commission). We submitted prior testimony in this matter. It discussed the purposes behind the BK Act and the distinctive features of the PUC (and the Energy Commission and perhaps 3 or 4 other state agencies). Most agencies have boards that meet every three months or so, with members not serving on a full time basis – or close to it. They generally gather for final decisions and their Executive Officer (or Director) entirely administers the agency, including coordination, information gathering, communication to outsiders, *et al.*

[1] The *Reporter* has been in hiatus in recent years, but back issues are now being completed and it is expected to be updated to current in the near future.

[2] CALIFORNIA REGULATORY LAW AND PRACTICE, with Folsom (treatise) (Butterworths 1983, Supplements 1985, 1987, 1989).

The initial Little Hoover Commission inquiry concerned a recent legislative enactment limiting communications among members of commissions and boards (which are necessarily subject to BK Act application). The issue arose in 2006, with a problematical California Court of Appeal decision in *Wolfe v. City of Fremont* 144 Cal.App.4th 533 (2006). The BK Act allows a member of a board or commission to communicate privately with one other member, but prohibits 3 or more from discussing a matter among themselves except in public session. The concept is that the decision is not to be reached based on private negotiations, rendering impotent the public meeting and public comments. Accordingly, the statute had been interpreted to similarly prohibit "serial" communications involving additional commission or board members *(i.e.,* two could not have a private conversation about what the agency might do, which one then transmits to a third, or perhaps a fourth, achieving what may be a *fait accompli* – rendering the public decision-making meeting irrelevant). And that concern is especially marked when applied to a relatively small five member board or commission (such as the PUC) where a single serial communication beyond two members can achieve a majority decision.

But the *Wolfe* decision undermined that application of the law, leading to a possible circumvention of the transparent decisionmaking intended by the BK Act. The obvious flaw in the holding resulted in corrective legislation (SB 1732 Romero) to overturn it as to the Brown Open Meetings Act applicable to local agencies (now Chapter 63, 2008). AB 1494 (Eng) was then enacted the following year. The relevant change it made in response to *Wolfe* (and similar to the change for the Brown Act applied to local boards and commissions) is to amend the relevant section as follows:

"Section 11122.5 of the Government Code is amended to read:

11122.5. (a) As used in this article, "meeting" includes any congregation of a majority of the members of a state body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the state body to which it pertains.

(b) (1) A majority of the members of a state body shall not, outside of a meeting authorized by this chapter, **use a series of communications of any kind, directly or through intermediaries, to discuss,** deliberate, or take action on any item of business that is **within the subject matter of the state body**" (emphasis added).

The problem with the change is the possible overreach involved in its bright-line formulation of "discuss" including "any intermediaries" (such as staff) -- combined with the very broad "within the subject matter of the state body." The *Wolfe* decision may have been over-corrected by AB 1494 (and SB 1732) when applied to an agency where the Board members have their own respective administrative role within the agency.

As my previous testimony outlined, for the PUC, Energy Commission, Water Board or others where the board or commission is composed of full time, salaried positions with administrative duties, there is a need for communications between commission members, and certainly between their staffs.

I therefore suggested an amendment to the statute in my original written testimony. I would repeat that proposal, with revised wording to fashion an exception to (b)(1) above, that would read:

11122.5 (b) (2) Where an agency is governed by a multi-member board or commission of full-time employed persons whose duties include administrative agency functions, such members and their intermediaries may communicate among themselves as to background or general information concerning the subject matter of the agency's jurisdiction and as to logistical arrangements relevant to allocation of workload, scheduling, and related organizational issues. However, those communications shall not propose, advocate, or comment upon the merits of any substantive decision pending before the agency."

That would seem to preserve the substantive purposes of the BK Act, while recognizing the somewhat more compelling need of some important agencies to coordinate operations between the offices of multiple commissioners.

Beyond the above issue are three other matters necessarily raised in this discussion, now amplified by recent public disclosures – and all a long concern of CPIL. The first one below was addressed briefly in oral testimony and I here explain in writing its rationale. The recommendation above and all four explained below are central to the role of the Little Hoover Commission in examining and recommending improvements to government processes.

2. "Hybrid" Adjudications (with Broad Public Impact) and Public Review Prior to Finality

One of the issues raised in the current consideration of the BK Act is the difference in confidentiality requirements between adjudications and rulemaking. The BK Act liberally allows boards and commissions to meet in "closed" or executive section to deliberate a final adjudicative decision. Government Code Section 11126(c)(3). While oral argument on appeal to such a board or commission is a public matter, the deliberation of the final decision is confidential. Such a final, privately negotiated decision and wording of a final decision is allowed as a matter of course for agency boards. Indeed, it is allowed for all multi-member courts (*e.g*., appellate panels) even within the judiciary. In contrast, a rulemaking decision of broad application is entirely transparent, with all evidence, testimony, and proposed amendments and final language subject to open and transparent discussion, motions and voted adoption. Government Code Section 11340 *et seq*.

But a problem occurs where an adjudication proceeding has wide impact on the public. In this instance, we cannot be certain that the parties before the agency's adjudicatory hearing have considered all of the consequences to third parties. These are especially noteworthy in the recent allowance of agencies to issue adjudicatory decisions that they want to apply generally by specifically designating them "precedential". This means that the decision is explicitly to bind other licensees.[3] These types of decisions, and the rate cases of the PUC, we refer to as "hybrid" proceedings because they involve an adjudicatory format that can limit who offers evidence, but achieve a final result that affects many persons outside of the parties contributing. Indeed, even traditional court cases may create results well beyond the scope of the named parties, with often devastating "unintended consequences." Accordingly, traditional court proceedings try to ameliorate this problem by allowing intervenors and "real parties in interest" to participate, to consider *amicus curiae* briefs at the appellate level. Similarly, in class action cases there is a requirement of notice to all affected, with publication of the final settlement and broad opportunity to object, including formal hearing considering those objections (with participation not by just the parties, but by objectors as well, prior to final entry.

We respectfully contend that the executive branch "hybrid proceedings" referred to above (e.g, rate setting and designated precedential decisions) share many of these characteristics and should properly also be adjusted accordingly. They best include the **simple safeguard now common in class action adjudications: Notice and consideration of objections, a hearing to allow oral presentation by those objectors, and consideration of the concerns and evidence adduced in the final decision**. That simple step would not add appreciable delay, but would give those who did not participate nor understand the broader implications a chance to comment about unintended consequences for consideration by the agency. This was mentioned in my oral testimony and is particularly important for the PUC, where these hybrid (rate) proceedings allow *ex parte* contacts more liberally while the case is in consideration.

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[3] See Government Code Section 11425.60 requiring an "index" of such decisions for easy access. Note also that that Section 11430.10 imposes strict ex parte contact prohibitions – substantially stricter than is the case with the PUC rules governing ratemaking. It would appear, at the very least, the PUC could replicate 11430.10 since its ratemaking is likely to have more profound external impact beyond participating parties than is the case with most precedential decisions. But for both precedential decisions and ratemaking, some allowance for input outside of the limited parties providing evidence in the hearing process is advisable, at least at some point prior to finality.

See also Government Code Section 11465.10 *et seq*. involving "declaratory" decisions that can be requested by parties. This also raises some concern over "set up" proceedings by two parties to achieve a decision that may affect third parties who may not easily provide input given the adjudicative format. However, these declaratory proceeding applications have been rare to date.

3. Move PUC ALJs to OAH to Assure Basic Integrity

The disclosures about a utility (PG&E) attempt to manipulate the selection of an administrative law judge (ALJ) within the PUC raises a related concern for this Commission.[4] First, ALJs generally do not write final decisions, but submit "proposed" decisions to the agency commission or director. But they play the critical role of a judicial bench trial – they listen to the evidence, they observe the witnesses, they ask questions themselves, they arrive at findings of fact, and issue a decision as to consequence. The last part is subject to alteration more easily than is a court decision, but it carries with it all of the considerable deference to the "fact finder" delegated the task of determining what happened and what is reliable information.

The concern over the selection and institutional bias does not arise for most of the agencies of California. Almost all ALJs come from a central "Office of Administrative Hearings" (OAH). In contrast, several agencies *(e.g.*, the PUC, the Insurance Commissioner) have in-house ALJs. There is an endemic problem with that internal structure. As we have learned in mid-September, it is in a location amenable to corruptive selection – anathema to any judicial system. And that problem is much enhanced where the selection is made by PUC decisionmakers very familiar and engaged with the utility lobbyists involved. And there is another side of the same coin. The utilities are entitled to a fair hearing as well. And having the very agency charged with their regulation controlled by these judges involves too much control of the prosecutor over the adjudicator. The utilities are hesitant to so comment publicly, but that concern is hardly a secret, and it is not groundless. So the problems of this incestuous structure extend in both directions.

The major argument against having PUC ALJs coming from the OAH is the usual "but OAH ALJ's are generalists and these ALJs must have esoteric expertise in a subject matter." That is a meritorious argument. And, in fact, CPIL made that very argument in our 1990 work for the legislature some years ago.[5] What that reform won, among other things, was a separate "Medical Quality Hearing Panel" of ALJs within OAH who now handle the medically related cases. Our argument was that if you have a critical mass of cases, you can have such a panel. It might facilitate peremptory challenges. It might make dismissal for incompetence easier. (*E.g.*, it is less likely to be steeped in "they are letting him go because he made decisions contrary to what they wanted".) The panel has been in effect for over two decades now, and has worked well.

In general, the OAH allows the administrative law judge to function independently from the actual personnel policies of the PUC. They become less vulnerable to accusations of bias in either direction. And, if you require a special panel of ALJ specialists in utility law and economics to handle all cases, there is no problem with lack of expertise. As I often tell my students: "the trick in regulation is to reconcile 'expertise' and 'independence." That is not always easy to do, but a distinct expert panel in a separate and independent part of state government moves in that direction. Accordingly, **the PUC ALJs should be moved over to the jurisdiction of the OAH, and there constituted as a special expert judicial "Utility Regulation Hearing Panel." similar to its Medical Quality Hearing Panel**. OAH would select the ALJ and govern issues of competence, promotion, *et al.*

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[4] The PUC revelations are not idiosyncratic at all. Indeed, other California agencies that house their own investigators, prosecutors, hearing officers / administrative law judges, and decisionmakers have encountered significant *ex parte* communication and other problems due to the decidedly in-house structure of their respective entire adjudicative processes. *See, e.g.*, *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board*, 40 Cal. 4th 1 (2006); *Rondon v. Alcoholic Beverage Control Appeals Board*, 151 Cal. App 4th 1275 (2007); *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board*, 149 Cal. App. 4t6h 116 (2007).

[5] See SB 2375 (Presley) (Chapter 1597, Statutes of 1990) adding, *inter alia*, Government Code Section 11371 *et seq*.)

4. Moderate the *Ex Parte* (Concealed) Lobbying that Facilitates Executive Branch Corruption.

Related to the above is the overriding issue of *ex parte* communications in general. One of the arguments raised by the PUC in testimony before this Commission is the need for liberal cross-communication between commission members to counter what may be misleading private arguments from a self-interested utility. But this *ex parte* problem relates to the central rationale behind the BK Act, which is to prevent such private arguments from being the sole determinant of the final decision. That abuse is facilitated by favorable private cross-communication of messages contaminated by *ex parte* lobbying between commission members. But whether communicated to commissioner "x" who then communicates it to commissioner "Y" and then to "z" in violation of the BK Act, the underlying problem is the unfair, secret, one sided argument being made. Indeed, the special interests counter BK compliance by themselves each communicating that concealed message to commissioners x, y and z themselves – accomplishing the same end – one which undermines the BK Act intent to have transparent public decisions made with public input and balanced consideration. And it violates that intent without violating the terms of the BK Act itself. The passive assent by a majority of public commissioners to a special interest decision arranged by private orchestration does not advance democratic values. Any system where one side may make claims without any check of the source,or consideration of alternative and contrary evidence, is dangerous.

Our longstanding concern over fair testing of evidence from all sides leads us to recommend a reexamination of *ex parte* messaging. It is clear that they are a problem even in an agency that has rules limiting their incidence, such as the PUC. But there are two problems with current law guiding agencies here: (1) *ex parte* rules are relaxed or non-existent for proceedings that are not pure adjudications (including the hybrid proceedings where evidence is taken in a confined hearing setting); and (2) those prohibitions/limitations are honored in the breach. The PUC is itself an example, with more extensive rules and registration/disclosure requirements for conversations with commissioners, *et al.* than generally apply.[6] This is an open secret about California agencies, one we have observed become increasingly troublesome over our years of examination. And so we respectfully proffer the following to the Honorable Little Hoover Commission – the one agency most likely to listen: This King Wears No Clothes.

The fact that legislators operate in extreme *ex parte* license has infected the executive branch with a similar mindset. And to their discredit, legislators have been unwilling to limit that license for themselves or for the entities they create. That has to change. For the balance of advocacy before the Legislature and these agencies (whose meetings we have been attending for 35 years) has become increasingly and alarmingly imbalanced. Leaving the Legislature aside, the agencies are divided into territories that correspond to the interests of specific economic-stake lobbies. They attend all meetings and are much involved in their own regulation – regulation intended and designed to constrain them *vis-à-vis* the general public. It is the latter that is the touchstone of a democracy. Our system properly separates the public domain from profit-stake interests.[7] And so we ask: Why are any *ex parte*

[6] Note that the PUC categorically prohibits ex parte contacts in adjudications, allows them without limit in rulemaking and imposes a complex system of partial notice for its hybrid "ratemaking" proceedings (see 20 CCR 8.3-8.5).

[7] Indeed, we would respectfully argue that the most pernicious form of corruption in the American system is the control of the People's government by those proprietary interests seeking to avoid "law and order" compliance. We reject socialism because we abhor the excessive state control of the "means of production." The removal of that separation is even more troublesome where it is the reverse, with the means of production seizing control of the state. Instead of limited regulation to correct market flaws, we have the sustenance of flaws harming consumers, and we have the use of the state itself as a barrier to competition that might limit the profits of those dominating current markets. The PUC, created because of the acknowledged absence of such market checks on a monopoly power enterprise, provides an extreme example of the need for independent check.

communications to an agency allowed, period, including to the persons charged with the final public decision? Given modern communications, **why cannot every such communication be posted where it may be viewed and commented upon by others?** What is the advantage to private conversations making contentions free from any check from any other source? Is there really a privacy concern here? What is it? Perhaps a separate channel could be allowed where legitimate "trade secret" disclosures are implicated. But we should all appreciate that this basis for corporate concealment is abused *in extremis*. **Perhaps we could go halfway and limit such private communications -- at least where the subject matter "is an issue currently before the agency for consideration and decision."** Certainly there is a need for consideration outside the realm of adjudicative hearings with ALJs where we have impacts beyond the parties to the proceeding. That is why there is greater license for rulemaking, and for hybrid proceedings that may involve hearings with ALJs (or others presiding) but which have impacts well beyond the parties providing most of the evidence being considered. That is why rulemaking – and we argue above the hybrid proceedings with rulemaking impact – warrant the final step of public notice, comment and hearing prior to final adoption. But whether the matter be adjudication, or hybrid rate setting or rulemaking – why should these officials (who are not themselves elected and directly accountable via that mechanism) not be required to function in public, with what they receive and what they decide all transparent to those who are their real governors – we the People? The radical change in communications technology over the past two decades especially commends such an alteration. To be sure, communications concerning scheduling or other matters without substantive elements relevant to the decisionmaking consideration of the agency may be excepted. But a public official subject to an *ex parte* phone call simply types who communicated, the basic contentions made, and posts it. An e-mail sent to a public official concerning substantive policy is copied and pasted to a central index kept by each agency and accessible from the web site. Any letters or written contentions are scanned by a simple machine now common and are similarly posted – all in a subject matter format allowing easy access. Replies, corrections and additional evidence may then be sent by any person to those who received the messages, and to the central repository for all to view. What communications do we want to allow in private, without such check? Why? What is the downside?

The change above would certainly ameliorate the concerns expressed about communications between commissioners or board members. For a major area of concern has to do with those serial communications augmenting private lobbying that lacks factual check or counter-comment. And the prevalence of this abuse is the open secret in Sacramento – one that should be of special concern to this Honorable Commission.